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CHEMFERT SDN BHD & ANOR

v.

LIM HUA

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SULONG MATJERAIE JCA
T SELVENTHIRANATHAN JCA
[CIVIL APPEAL NO: B-02-232-2007]

C

12 FEBRUARY 2010

CIVIL PROCEDURE: *Res judicata - Cause of action estoppel - Issue estoppel - Whether instant petition caught by doctrine of res judicata by reason of first petition - First petition and instant petition based on same facts and allegations - Nothing to prevent respondent from including a prayer in first petition which he attempted to obtain in instant petition - Matters which could and should reasonably have been raised in earlier proceedings - Consent order recorded in first petition acts as estoppel against respondent*

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In and around 2003, the second appellant ('Phuar Kong Seng') and the respondent ('Lim Hua') were the only shareholders and directors of the first appellant, Chemfert Sdn Bhd ('the company'). On 21 September 2004, an additional director was appointed, while Lim Hua was removed as director of the company. Lim Hua duly presented a petition under s. 218(1)(f) and (i) of the Companies Act 1965 ('the first petition') to wind up the company. On 19 May 2005, pursuant to a consent order, the first petition was struck out with no liberty to file afresh ('the consent order'). On 20 December 2005, Lim Hua presented another petition ('the instant petition') to be reinstated to the company's board of directors under s. 181 of the Companies Act 1965. The instant petition and the first petition were based on the same facts and allegations. Pursuant to the instant petition, Lim Hua subsequently filed an *ex parte* application and obtained *ex parte* orders for the appointment of interim receivers and managers ('R & M') and various ancillary reliefs (collectively, 'the *ex parte* order'). However, the *ex parte* order was set aside by the High Court on 9 January 2007. On 14 February 2007, Lim Hua re-applied for and obtained yet another order for the appointment of interim R & M and the same ancillary reliefs (collectively, 'the *inter partes* order') which is now the subject matter in this appeal lodged by Phuar Kong Seng and the company.

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Held (allowing the appellants' appeal and setting aside the order made by the High Court)
Per Low Hop Bing JCA:

(1) In a s. 181 petition, the petitioner is at liberty to rely on s. 218(1)(i). The merits thereof however depend on the facts and circumstances prevailing in each particular case. The scope of s. 218(1)(f) is sufficiently wide to cover a great number of situations which would lie outside s. 181 and although s. 218(1)(f) and s. 181(1) are differently worded, the effect is very similar if not the same. *Re Senson Auto Supplies Sdn Bhd* HC (refd); *Foo Yin Shung & Ors v. Foo Nyit Tse & Brothers Sdn Bhd* HC (refd). (paras 19-22)

(2) In order to prevent a multiplicity of actions and also to protect the underlying rationale of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. *Public Trustee v. Kenward* (refd); *Conquer v. Boot* (refd); *Chamberlain v. Deputy Commissioner of Taxation* (refd); *LE Walwin & Partners Ltd v. West Sussex County Council* (refd). (para 23)

(3) Issue estoppel also applies to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, though not actually decided by the court. *Res judicata* is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. *Greenhalgh v. Mallard* (refd); *Yat Tung Investment Co v. Dae Heng Bank & Anor* (refd); *SCF Finance Co Ltd v. Masri & Anor (No 3)* (CA); *Bell v. Holmes* (refd); *Hoystead v. Taxation Commissioner* (refd). (para 23)

(4) Lim Hua's first petition under the wider scope in s. 218(1)(f) and (i) has been adjudged upon and a consent order was recorded with no liberty to file afresh. There was nothing to prevent Lim Hua from including a prayer in the first petition which he attempted to obtain in the instant petition. His

presentation of the instant petition under the narrower scope in s. 181 was based on the same facts and allegations as in the first petition, which might have been but were not brought forward in the first petition either deliberately, negligently or inadvertently. The doctrine of *res judicata* clearly applies more specifically where the consent order, which has not been set aside, is binding on Lim Hua and acts as an estoppel against him. *Kinch v. Walcott and Others* (refd); *Kannapa Chettiar v. Vellasamy Pillai* (refd). (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Pada dan di sekitar 2003, perayu kedua ('Phuar Kong Seng') dan responden ('Lim Hua') adalah pemegang-pemegang saham dan pengarah-pengarah tunggal perayu pertama, Chemfert Sdn Bhd ('syarikat'). Pada 21 September 2004, seorang pengarah tambahan dilantik, sementara Lim Hua dibuang sebagai pengarah syarikat. Lim Hua kemudiannya mengemukakan suatu petisyen di bawah s. 218(1)(f) dan (i) Akta Syarikat 1965 ('petisyen pertama') untuk menggulungkan syarikat. Pada 19 Mei 2005, menurut suatu perintah persetujuan, petisyen pertama dibatalkan tanpa kebebasan untuk memfailkan semula ('perintah persetujuan'). Pada 20 Disember 2005, Lim Hua mengemukakan suatu petisyen lain ('petisyen semasa') untuk dikembalikan semula kepada lembaga pengarah syarikat di bawah s. 181 Akta Syarikat 1965. Petisyen semasa dan petisyen pertama berasaskan fakta-fakta dan pengataan-pengataan yang sama. Menurut petisyen semasa, Lim Hua selepas itu memfailkan suatu permohonan *ex parte* dan memperolehi perintah-perintah *ex parte* bagi pelantikan penerima dan pengurus interim ('P & P') dan beberapa relief-relief sampingan (secara kolektif, 'perintah *ex parte*'). Walau bagaimanapun, perintah *ex parte* telah diketepikan oleh Mahkamah Tinggi pada 9 September 2007. Pada 14 Februari 2007, Lim Hua memohon semula untuk dan memperolehi suatu lagi perintah bagi pelantikan P & P interim dan relief-relief sampingan yang sama (secara kolektif, 'perintah *inter partes*') yang kini merupakan isi rayuan semasa yang dibuat oleh Phuar Kong Seng dan syarikat.

Diputuskan (membenarkan rayuan perayu-perayu dan mengetepikan perintah yang dibuat oleh Mahkamah Tinggi)
Oleh Low Hop Bing HMR:

(1) Dalam suatu petisyen s. 181, pempetisyen bebas untuk bergantung pada s. 218(1)(i). Merit-meritnya walau bagaimanapun bergantung kepada fakta-fakta dan keadaan-keadaan yang ada

dalam setiap kes. Skop s. 218(1)(f) adalah cukup luas untuk merangkumi banyak situasi-situasi yang terdapat di luar s. 181 dan walaupun s. 218(1)(f) dan s. 181(1) diungkapkan secara berbeza, efeknya adalah sangat serupa jikapun tidak sama. *Re Senson Auto Supplies Sdn Bhd* (dirujuk); *Foo Yin Shung & Ors v. Foo Nyit Tse & Brothers Sdn Bhd* (dirujuk). A B

(2) Untuk mencegah kepelbagaian tindakan-tindakan dan juga untuk melindungi rasional mendasari estoppel *per rem judicatum* dan supaya tidak bertindak menentang mereka, kausa tindakan estoppel sebegitu telah dilanjutkan kepada semua kausa tindakan lain (berasaskan isu-isu atau fakta-fakta yang sama) yang sepatutnya dilitigasikan atau ditegaskan dalam tindakan asal lebih awal mengakibatkan penghakiman muktamad, dan yang tidak dibuat, sama ada secara sengaja atau disebabkan oleh kelalaian. *Public Trustee v. Kenward* (dirujuk); *Conquer v. Boot* (dirujuk); *Chamberlain v. Deputy Commissioner of Taxation* (dirujuk); *LE Walwin & Partners Ltd v. West Sussex County Council* (dirujuk). C D

(3) Isu estoppel juga terpakai kepada isu-isu yang mungkin dan yang tidak dihadapkan, sama ada secara sengaja atau disebabkan oleh kecuaian atau kelalaian, meskipun tidak sebenarnya diputuskan oleh mahkamah. *Res judicata* oleh itu tidak dihadkan kepada isu-isu yang mahkamah diminta menyelesaikan, tetapi meliputi isu-isu atau fakta-fakta yang nyata merupakan sebahagian daripada isi litigasi dan yang jelasnya boleh dibangkitkan ia akan merupakan suatu penyalahgunaan proses mahkamah untuk membenarkan suatu prosiding baru dimulakan berhubungan dengan mereka. *Greenhalgh v. Mallard* (dirujuk); *Yat Tung Investment Co v. Dae Heng Bank & Anor* (dirujuk); *SCF Finance Co Ltd v. Masri & Anor (No 3)*; *Bell v. Holmes* (dirujuk); *Hoystead v. Taxation Commissioner* (dirujuk). E F G

(4) Petisyen pertama Lim Hua di bawah skop yang lebih luas dalam s. 218(1)(f) dan (i) telahpun diputuskan dan suatu perintah persetujuan telah dicatatkan tanpa kebebasan untuk memfailkan semula. Tidak ada apa-apa yang menghalang Lim Hua dari masukkan satu tuntutan dalam petisyen pertama yang beliau cuba memperolehi dalam petisyen semasa. Petisyen semasa yang dikemukakan olehnya di bawah skop lebih kecil dalam s. 181 adalah berdasarkan fakta-fakta dan pengataan-pengataan yang sama seperti dalam petisyen pertama, yang mungkin tetapi tidak dihadapkan dalam petisyen pertama sama H I

ada secara sengaja, cuai atau lalai. Doktrin *res judicata* nyata terpakai lebih khususnya di mana perintah persetujuan, yang tidak diketepikan, mengikat atas Lim Hua dan bertindak sebagai estoppel terhadapnya. *Kinch v. Walcott and Others* (dirujuk); *Kannapa Chettiar v. Vellasamy Pillai* (dirujuk).

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bell v. Holmes [1956] 3 All ER 449 ***(refd)***

Chamberlain v. Deputy Commissioner of Taxation [1988] 62 ALJR 324 ***(refd)***

Chong Kew v. Leow Lay & Ors [2009] 1 CLJ 756 CA ***(refd)***

Conquer v. Boot [1928] 2 KB 336 ***(refd)***

Foo Yin Shung & Ors v. Foo Nyit Tse & Brothers Sdn Bhd [1989] 2 CLJ 419; [1989] 1 CLJ (Rep) 552 HC ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Hoystead v. Taxation Commissioner [1962] AC 155 ***(refd)***

Lawlor v. Gray [1984] 3 All ER 345 ***(refd)***

LE Walwin & Partners Ltd v. West Sussex County Council [1975] 3 All ER 604 ***(refd)***

Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & 5 Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Kinch v. Walcott and Others [1929] AC 482 ***(refd)***

Kannappa Chettiar v. Vellasamy Pillai [1976] 1 LNS 47 HC ***(refd)***

Public Trustee v. Kenward [1967] 2 All ER 870 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***

Re Senson Auto Supplies Sdn Bhd [1987] 1 LNS 110 HC ***(refd)***

SCF Finance Co Ltd v. Masri & Anor (No 3) [1987] QB 1028 ***(refd)***

Superintendent Of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***

Yat Tung Investment Co v. Dae Heng Bank & Anor [1975] AC 581 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 150, 181(1), (2), 218(1)(f), (i)

Evidence Act 1950, s. 40

Other source(s) referred to:

Loh Siew Cheang, *Corporate Powers Controls, Remedies and Decision-making*, 1996, para 9.12, p 166

For the appellant - Conrad Young (CM Loo & K Thavanesan with him); M/s Abu Hassan & Assoc

For the respondent - Harjinder Singh (Hoo Lin Coln with him); M/s Lin Coln & Co

Reported by Susheila Sreedharan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 10 December 2009, we allowed the appellants' appeal and set aside the order made by the High Court against them pursuant to the respondent's petition presented under s. 181 of the Companies Act 1965. (A reference hereinafter to a section is a reference to that section in the Companies Act 1965, unless otherwise stated).

[2] We now provide our grounds.

Agreed Facts

[3] The agreed facts prepared and signed by the parties' counsel respectively are simple and straightforward.

[4] In and around 2003, the second appellant ("Phuar Kong Seng") and the respondent ("Lim Hua") were the only shareholders and directors of the first appellant, Chemfert Sdn Bhd ("the company").

[5] At the instance of Phuar Kong Seng and pursuant to a court-convened extraordinary general meeting under s. 150, an additional director was appointed, while Lim Hua was removed as director of the company on 21 September 2004.

[6] Subsequently, Lim Hua presented a petition under s. 218(1)(f) and (i) ("the first petition"), seeking to wind up the company.

[7] On 19 May 2005, pursuant to a consent order, the first petition was struck out with no liberty to file afresh ("the consent order").

[8] On 14 December 2005, Lim Hua filed a writ to set aside the consent order. (There was no indication on the outcome of that writ).

[9] On 20 December 2005, Lim Hua presented another petition ("the instant petition") seeking to be reinstated to the company's board of directors under s. 181. The instant petition and the first petition were based on the same facts and allegations. Pursuant to

the instant petition, on 15 March 2006, Lim Hua filed an *ex parte* application. On 20 April 2006, he obtained an *ex parte* order for the appointment of interim receivers and managers ("R & M") and various ancillary reliefs (collectively, "the *ex parte* order"). However, on the *inter partes* application of Phuar Kong Seng and the company, the *ex parte* order was set aside by the High Court on 9 January 2007.

[10] Thereafter, again in the instant petition, on 14 February 2007, Lim Hua re-applied for and obtained yet another order for the appointment of interim R & M and the same ancillary reliefs (collectively, "the *inter partes* order") which is now the subject matter in the instant appeal lodged by Phuar Kong Seng and the company.

Questions For Determination

[11] In the instant appeal, parties' respective learned counsel had agreed and formulated five questions for determination by us.

[12] The first question was whether the instant petition is caught by the doctrine of *res judicata* by reason of the first petition.

[13] After hearing submissions, we answered the first question in the affirmative and held that the answer had effectively and completely disposed of the instant appeal, in which case, there was no necessity for us to deal with the other four questions.

Res Judicata

[14] Learned counsel Mr Conrad Young (Mr CM Loo and Mr K Thavanesan with him) submitted that the instant petition is caught by the doctrine of *res judicata* as Lim Hua had previously presented the first petition based on the same facts and allegations and that the first petition had by consent been struck out on 19 May 2005 with no liberty to file afresh. They made reference *inter alia* to *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783; *Kinch v. Walcott and Others* [1929] AC 482, 493-494; and *Kannappa Chettiar v. Vellasamy Pillai* [1976] 1 LNS 47; [1977] 1 MLJ 255-256 HC.

[15] Lim Hua's learned counsel Mr Harjinder Singh, assisted by Mr Hoo Lin Coln, argued that the doctrine of *res judicata* was inapplicable.

[16] It is pertinent for us to examine the first petition and the instant petition presented by Lim Hua, in the light of the doctrine of *res judicata*.

[17] On the agreed facts, Lim Hua had presented the first petition under s. 218(1)(f) and (i) which provide that the High Court may order the winding up if:

> (f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;
>
> (g) …
>
> (h) …
>
> (i) the Court is of opinion that it is just and equitable that the company be wound up;

[18] The instant petition was presented by Lim Hua pursuant to s. 181(1) and (2) which, where relevant, provide for remedies in cases of an oppression, in the following words:

> 181(1) Any member …, may apply to the Court for an order under this section on the ground:
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members … including himself or in disregard of his or their interests as members, shareholders …; or
>
> (b) that some act of the company has been done … which unfairly discriminates against or is otherwise prejudicial to one or more of the members … (including himself).
>
> (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may -
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;

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(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares … of the company by other members … of the company or by the company itself;

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(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

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[19] Sections 181, 218(1)(f) and (i) have been considered quite frequently by our courts, eg.:

(i) In *Re Senson Auto Supplies Sdn Bhd* [1987] 1 LNS 110 HC, a s. 181 petition was presented in which, during arguments, counsel for the petitioners also relied upon the just and equitable ground under s. 218(1)(i). Edgar Joseph Jr J (later FCJ) dealt with s. 181 and s. 218(1)(i) and held that he was not satisfied that the charges of oppression or discrimination were made out under s. 181, neither was he satisfied that it would be just and equitable to wind up the company under s. 218(1)(i).

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(ii) Peh Swee Chin J (later FCJ), in deliberating on the effect of s. 218(1)(f) in *Foo Yin Shung & Ors v. Foo Nyit Tse & Brothers Sdn Bhd* [1989] 2 CLJ 419; [1989] 1 CLJ (Rep) 552 HC, held that the scope thereof is very wide indeed and can cover a great number of situations which would lie outside s. 181 in connection with "oppression" or "disregard" as judicially explained in, notably, *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170 PC.

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[20] Advocate and solicitor Loh Siew Cheang writes in *"Corporate Powers Controls, Remedies and Decision-making"* (1996) p. 166 para 9.12 that if the conduct complained of justifies a winding up of a company under s. 218(1)(f) on the account of directors having acted in the affairs of the company in their own interest rather than in the interests of the members as a whole or in a manner which is unjust or unfair to members or under s. 218(1)(i) on just and equitable grounds, the same type of conduct caught under these two provisions would most probably attract jurisdiction under s. 181: *Foo Yin Shung & Ors, supra, Re Senson Auto Supplies Sdn Bhd, supra.*

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[21] The learned author also referred to *Tuan Haji Ishak Ismail v. Leong Hup Holdings Berhad & 5 Other Appeals* [1996] 1 CLJ 393 CA, where Shankar JCA (as he then was) spoke for the Court of Appeal and held *inter alia* that while s. 218(1)(f) is differently worded, the effect is very similar if not the same as that of s. 181(1).

[22] From the judgments in *Re Senson Auto Supplies Sdn Bhd, supra;* and *Foo Yin Shung & Ors, supra*; and the analysis by the aforesaid learned author, we would distill the following principles:

(i) In a s. 181 petition, the petitioner is at liberty to rely on s. 218(1)(i). We hasten to add that the merits thereof must necessarily depend on the facts and circumstances prevailing in each particular case;

(ii) The scope of s. 218(1)(f) is sufficiently wide to cover a great number of situations which would lie outside s. 181; and

(iii) Although s. 218(1)(f) and s. 181(1) are differently worded, the effect is very similar if not the same.

[23] In the light of these principles, we shall now consider the landmark decision in *Asia Commercial Finance (M) Bhd, supra*. First, the facts there revealed that a fixed loan of RM750,000 ("the loan") for housing development was granted by the finance company to the borrower, on the security of several pieces of land. On the borrower's default, the finance company successfully obtained an order for sale from the land administrator. The borrower then filed an originating motion in the High Court against the finance company, seeking, *inter alia*, to set aside the order for sale and damages in connection with the failure of the borrower's housing project. The High Court and the (then) Supreme Court dismissed the borrower's originating motion and appeal respectively. Subsequently, the borrower brought a writ action against the finance company on the same ground as the originating motion. The finance company applied to strike out the borrower's statement of claim on a plea of *res judicata* but it was dismissed. The finance company's appeal was allowed by the (then) Supreme Court. Peh Swee Chin SCJ (as he then was) gave a comprehensive and scholarly account of the doctrine of *res judicata*, the relevant principles of which we gratefully extract and apply as follows:

(i) *Res judicata* simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*;

(ii) When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties who should accept it as the truth – *res judicata pro veritate accipitur*;

(iii) The public policy of the law is that it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*;

(iv) It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*;

(v) Both the aforesaid maxims in (3) and (4) are the rationale for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy;

(vi) Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum* which archaically was described as estoppel by record;

(vii) The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time: per Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 at p 115; the 'point' should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties;

(viii) One of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties because a default judgment is different from a final judgment on the merits;

(ix) The well-known relevancy of a previous judgment in barring a second suit is seen in s. 40 of the Evidence Act 1950, which provides as follows:

> The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial.

(x) There are in fact two kinds of estoppel *per rem judicatum*, the first relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first;

(xi) The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action ie, cause of action, merges into the final judgment; in layman's language, the cause of action has turned into the final judgment. The cause of action may not be relitigated between the same parties because it is *res judicata*;

(xii) In order to prevent a multiplicity of actions and also in order to protect the underlying rationale of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence; see *Public Trustee v. Kenward* [1967] 2 All ER 870; [1967] 1 WLR 1062; *Conquer v. Boot* [1928] 2 KB 336; *Chamberlain v. Deputy Commissioner of Taxation* [1988] 62 ALJR 324; and *LE Walwin & Partners Ltd v. West Sussex County Council* [1975] 3 All ER 604;

(xiii) Issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, in law, issue estoppel means a lot more, ie, that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties; neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision;

(xiv) Issue estoppel prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action: per Peter Gibson J in *Lawlor v. Gray* [1984] 3 All ER 345 at p 350;

(xv) In preventing such contradiction of the previous judgment, one school of thought holds that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata*, ie, the doctrine of estoppel *per rem judicatum*;

(xvi) Our Federal Court prefers the aforesaid contrary view, which represents a correct, even though broader, approach to the scope of issue estoppel and is warranted by the weight of authorities being completely in accord or resonant with the rationale behind the doctrine of *res judicata*, particularly the question of public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and the expanding resources of the courts being found always one step behind the resulting increase in litigation;

(xvii) *Res judicata* for this purpose is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them: per Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p 257; and quoted with approval in the Privy Council in *Yat Tung Investment Co v. Dae Heng Bank & Anor* [1975] AC 581; [1975] 2 WLR 690 (see also *SCF Finance Co Ltd v. Masri & Anor (No 3)* [1987] QB 1028; [1987] 1 All ER 194 (CA); *Bell v. Holmes* [1956] 3 All ER 449; [1956] 1 WLR 1359; and *Hoystead v. Taxation Commissioner* [1962] AC 155;

(xviii) The words 'exercising reasonable diligence' in *Henderson, supra*:

(a) necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring in at the previous trial the issues which should have been brought in the earlier action and which were not, or in asserting all other causes of action arising out of the same facts in the earlier action and which were not;

(b) ought to be understood as a gentle rebuke for the failure aforesaid despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action; and

(c) are not meant to impose a pre-condition for applying the doctrine of *res judicata*, but are meant to say that the non-bringing of the issues would count in any event irrespective of whether the failure was or was not deliberate or due to inadvertence or negligence;

and

(xix) The court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata* against a party, even if it has not been pleaded, as estoppel is based on a question of public policy, and there should be finality in litigation: *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256, per Abdoolcader SCJ (as he then was).

(See also *Chong Kew v. Leow Lay & Ors* [2009] 1 CLJ 756, 787 to 790 CA).

[24] Reverting to the mainstream of this appeal, it is noteworthy that Lim Hua's first petition under the wider scope in s. 218(1)(f) and (i) has been adjudged upon and the result was the recording of a consent order with no liberty to file afresh. In the first petition, there was nothing to prevent Lim Hua from including a prayer which he attempted to obtain in the instant petition. His presentation of the instant petition under the narrower scope in s. 181 was based on the same facts and allegations as in the first

petition, which might have been but were not brought forward in the first petition either deliberately, negligently or inadvertently. That clearly attracts the application of the doctrine of *res judicata*, more specifically where the consent order, which has not been set aside, is binding on Lim Hua and acts as an estoppel against him: See eg, *Kinch v. Walcott* and others, *supra* at p 482; and applied by Mohamed Azmi J (later FCJ) in *Kannappa Chettiar, supra* at p. 256. *A fortiori*, when we take into consideration the broader approach set out in para. [23] (15) and (16) above, there is absolutely no doubt that the doctrine of *res judicata* is applicable.

Conclusion

[25] On the foregoing grounds, we made the orders set out in para. [1] above. Costs of RM5,000 to Phua Kong Seng and the company. Deposit to be refunded to them.